

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Case No. HBC 266 of 2023

BETWEEN : XIAOLONG HU and LIJUAN ZHENG  
Plaintiffs

AND : LIANG DING  
First Defendant

WEIXIANG CAO  
Second Defendant

JULIAN SUNG KONG YUEN  
Third Defendant

REGISTRAR OF COMPANIES  
Fourth Defendant

ATTORNEY GENERAL OF FIJI  
Fifth Defendant

RESERVE BANK OF FIJI  
Sixth Defendant

Hearing : On the papers  
Judgment : 7 April 2025

## **JUDGMENT AS TO COSTS**

- [1] The Plaintiffs seek leave under O.21, r.3 of the High Court Rules 1988 to discontinue their claim. According to their affidavit in support<sup>1</sup>, they wish to await the conclusion of criminal investigations into their complaints against the defendants. They have signalled an intention to commence fresh proceedings at the conclusion of the criminal investigations. The Plaintiffs acknowledge that they will be liable for costs for discontinuing the present claim.
- [2] I have directed the defendants to file memoranda on their respective positions. The Plaintiffs were permitted an opportunity to respond.
- [3] The defendants have taken the opportunity to file memoranda with the exception of the Fourth and Fifth Defendants. The defendants seek a permanent stay against the Plaintiffs preventing them from commencing fresh proceedings against them regarding the same complaints that are the subject of the present proceeding. The First Defendant also seeks indemnity costs or, in the alternative, costs of \$325,000. The Second and Third Defendants seek costs of \$100,000 against the Plaintiffs and \$4,000 against the Plaintiff's solicitors – the latter on the basis that the solicitors have failed to discharge their duty to ensure the proceedings were properly brought and maintained. The Sixth Defendant seeks indemnity costs or, in the alternative, costs of \$50,000.
- [4] As will be plain from the orders sought by the defendants, they take issue with the Plaintiffs' conduct. They argue that that the proceedings were ill conceived and that the Plaintiffs, and their solicitors, will have (or should have) been aware of this. They refer to the fact that the Plaintiffs have failed to disclose material information that undermine their allegations – as accepted by this Court in its Judgment of 9 August 2024 striking out parts of the Plaintiffs' claim. The defendants are also aggrieved at the timing of the discontinuance. The initial Notice being filed on 13 February 2025. There are three separate strike out applications before this Court – two of which were scheduled for

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<sup>1</sup> The first named plaintiff has executed an affidavit dated 24 February 2025.

hearing on 14 March 2025. The defendants consider the discontinuance to be a ploy by the Plaintiffs to avoid their claims being struck out.

- [5] Pursuant to O.21, r.3, a party must seek leave of the court to discontinue their claim after the expiry of 14 days following service of the defendants' statement of defence(s). Where the court grants leave, it may do so *'on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just'*. Rule 5 provides that *'[w]here a party has discontinued an action...and [that party] is liable to pay other party's costs of the action...then if, before payment of those costs, he [or she] subsequently brings an action for the same, or substantially the same, cause of action, the Court may order the proceedings in that action to be stayed until those costs are paid'*.
- [6] The defendants filed their defences in late 2023.<sup>2</sup> As such, the Plaintiffs require leave to discontinue their claim.
- [7] Where leave is granted, the Court has a wide discretion to award costs. The general principles are trite. Successful parties are entitled to an award of costs. The costs must pertain to the proceeding. The successful party is entitled to a contribution toward their legal costs. In certain circumstances, where the conduct of the unsuccessful party warrants, the court may order that the successful party is entitled to recovery of all its legal costs. The court may, pursuant to O.62, r.11 of the High Court Rules make an award against the solicitors of the unsuccessful party.
- [8] In my decision of 9 August 2024, I found that the Plaintiffs had deliberately failed to disclose key facts and information and I expressed concern over whether these proceedings were brought by them in good faith. I struck out the Plaintiffs' pleadings pertaining to the allegations of fraud yet permitted the Plaintiffs an opportunity to file better particulars in respect to the causes of action which were not struck out. The Plaintiffs filed amended pleadings on 30 August 2024. The First Defendant filed a summons to strike out the amended pleadings shortly thereafter as did the Sixth Defendant. There followed a second and third amended Statement of Claim by the Plaintiffs in October and November 2024 respectively. In late November 2024,

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<sup>2</sup> The First Defendant has also filed a counterclaim in respect to the costs of this proceeding - the Plaintiffs filed a defence to the counterclaim on 11 December 2023.



separate strike out applications were filed by the First Defendant as well as the Second and Third Defendants.<sup>3</sup>

### **Decision**

- [9] I have no doubt that the first three defendants, in particular, will have been put to considerable cost defending this proceeding to date. Multiple applications have been filed by them along with detailed affidavits. They will also have incurred, as their counsel has indicated, significant costs related to other matters indirectly related to these proceedings, being investigations by the Fiji Police and FICAC – instigated by complaints made by the Plaintiffs. However, those investigations, and the related costs, are not before this Court and cannot be considered in the present award of costs. The other matter to note is that I have already made an order for costs in my Judgment of 9 August 2024 and, therefore, the costs incurred by the defendants pertaining to the applications determined in that decision (to dissolve the injunction of 19 December 2023 and to strike out the Plaintiffs initial Statement of Claim) cannot be considered in the award that I make now.
- [10] I am not prepared to make the stay orders sought by the defendants. The defendants seek a range of orders - restraining the Plaintiffs from commencing fresh proceedings pertaining to the same subject matter, and a declaration that any litigation arising from the contractual agreements between the Plaintiffs and the First and Second Defendants must be brought in China, not Fiji. While I have concerns over the Plaintiffs conduct in this proceeding, I am not prepared to make, or feel in any position to make, the stay orders and declaration sought by the defendants.
- [11] Nor am I prepared to award indemnity costs for the defendants against the Plaintiffs or costs against the Plaintiffs' solicitors.
- [12] In *AG v Draunidalo* [2009] FJCA 54 (16 March 2009), the Court of Appeal explained where an award of indemnity costs will be made:

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<sup>3</sup> I am grateful to Ms Tivao for providing a chronology for this proceeding - annexed to her Memorandum.

[8] In this regard, the meaning of indemnity costs is set out in *State v Police Service Commission, ex parte Beniamino Naiveli JR*; 29/94. In that case, Scott J considered indemnity costs was a term commonly used to indicate a more generous award than the usual party and party costs provided for under the High Court Rules. Essentially, what was contemplated as the basis for calculation of indemnity costs was costs payable to a barrister and solicitor by his or her own client. This was considered in *Public Service Commission v Naiveli* [1996] FJCA 3 by Casey JA who observed:

Scott J issued a supplementary judgment on 4 September 1995 awarding the indemnity costs which are the subject of the appeal. He adopted the conclusions of Sir Robert Megarry in *EMI Records* above (ie *EMI Records v Wallace* [1982] 2 All ER 980), and accepted that such costs may be awarded only in exceptional cases. He referred to counsel's submission that the respondent had been dismissed from the Police Force after several years' suspension, and that the decision was adhered to by the Commission, even after its attention had been drawn to the irregular way in which it had been made. He added some strictures about the inadequate scale of party and party costs, with its resulting unfairness and even hardship to successful litigants, and in particular to the respondent. However, neither considerations of hardship to the successful party nor the over optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable - see the examples discussed in *Thomson v Swan Hunter and Wigham Richardson Ltd* [1954] 2 All ER 859 and *Bowen-Jones* [1986] 3 All ER 163.

[9] There are a large number of authorities, many of which are cited in the written submissions of the Appellant, which made the point that the award of indemnity costs is an exceptional basis for the award of costs. With attempting an exhaustive review of the authorities or wishing to add to the long list of authorities on the topic, the award of indemnity costs would only be considered in exceptional cases where the conduct of a party (or, possibly, its

*legal representatives) was reprehensible to a significant degree.*

- [13] I am unable to conclude on the information presently available to the Court that the Plaintiffs conduct in this proceeding has been reprehensible to a significant degree. Nevertheless, I am satisfied that the Plaintiffs conduct has caused the first three defendants in particular to incur considerable legal costs – the most obvious examples of this conduct being the filing of three amended statement of claims, the filing of the discontinuance with the strike out hearing fast approaching and the serious allegations of fraud (struck out by me in August 2024) which necessitated the filing of defences in 2023. As such, the defendants are entitled to a higher contribution than would otherwise be the case at this stage of the proceeding. Also, the Plaintiffs should not be permitted to bring fresh proceedings against the defendants unless and until they have paid the costs awarded in this proceeding.

#### **Orders**

- [14] For the above reasons, I make the following orders:

- i. Leave is granted to the Plaintiffs to discontinue their claim.
- ii. The First Defendant is entitled to costs summarily assessed in the amount of \$15,000 payable by the Plaintiffs within three months.
- iii. The Second and Third defendants are entitled to costs summarily assessed in the amount of \$15,000 payable by the Plaintiffs within three months.
- iv. The Sixth Defendant is entitled to costs summarily assessed in the amount of \$3,000 payable by the Plaintiffs within three months.<sup>4</sup>
- v. The Plaintiffs are not permitted to commence new proceedings against any of the defendants arising from the same matters that are the subject

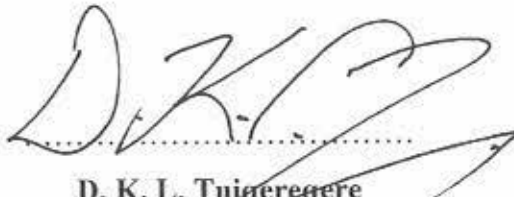
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<sup>4</sup> The Fourth and Fifth Defendants did not file any memorandum on costs and, therefore, no order is made for these parties.



of this proceeding unless and until the Plaintiffs have paid all costs awarded to the defendants in this proceeding.



  
D. K. L. Tuiqereqere  
JUDGE

**Solicitors:**

**Vosarogo Lawyers for the Plaintiffs**

**Jamnadas & Associates for the First Defendant**

**Shirley Lavenia Susan Legal for the Second & Third Defendants**

**Office of Attorney-General's Chambers for the Fourth & Fifth Defendants**